

Quarles & Brady LLP
Firm State Bar No. 00443100
Renaissance One
Two North Central Avenue
Phoenix, AZ 85004-2391
TELEPHONE 602.229.5200

David T. Barton (#16848) dtb@quarles.com
Carrie M. Francis (#20453) cfrancis@quarles.com
Benjamin J. Naylor (#23968) bnaylor@quarles.com
Attorneys for Defendant

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Charles W. Gribben,

Plaintiff,

vs.

United Parcel Service, Inc.,

Defendant.

CIV-04-02814 PHX FJM

**DEFENDANT UNITED PARCEL
SERVICE'S SECOND MOTION
FOR SUMMARY JUDGMENT**

(Honorable Frederick J. Martone)

Defendant United Parcel Service, Inc. ("UPS") moves this Court for summary judgment on Plaintiff Charles W. Gribben's ("Gribben") disability discrimination claim. Assuming Gribben has a disability (a disputed fact, which is immaterial for purposes of this motion), he is not a qualified individual with a disability because he cannot perform the essential functions of his job with or without a reasonable accommodation. The accommodations his doctor says are essential to his good health are both futile and unreasonable.

Gribben's doctor restricted Gribben from working in temperatures in excess of 90-degrees Fahrenheit for more than 20 minutes at a time. As an ADA accommodation, Gribben proposes that UPS allow him to drive only air-conditioned vehicles during his shift and give him a 5 to 10 minute break every 20 minutes so that he can cool down.

UPS contends that these restrictions disqualify Gribben under the ADA because the accommodations he requires are (1) futile, since air conditioning would not lower the temperature to the 90-degree environment he needs; and (2) unreasonable, because they

1 would require UPS to eliminate one or more of the essential functions of Gribben's job
2 and/or substantially modify its operations.

3 This motion is supported by the following Memorandum of Points and Authorities,
4 the concurrently filed Statement of Facts, and the entire record herein.

5 **MEMORANDUM OF POINTS AND AUTHORITIES**

6 **I. FACTUAL BACKGROUND**

7 Gribben began working for UPS in 1982. (Defendant United Parcel Service's
8 Statement of Facts ["DSOF"] ¶ 1.) Since 1998, Gribben has worked full-time as a shifter
9 driver. (DSOF ¶ 1.) Gribben's work shift typically runs from 1:00 p.m. until
10 approximately 9:30 or 10:00 p.m. (DSOF ¶ 2.) A shifter driver moves large, long-haul
11 tractor trailers from drop-off points to unloading points at UPS's distribution center.
12 (DSOF ¶ 3.) These trailers are moved using specially-designed vehicles called "shifters,"
13 hence the job title "shifter driver." (DSOF ¶ 3.) Shifters are specifically designed for
14 local use, and cannot be used on the road as delivery vehicles. (DSOF ¶ 3.) Shifter
15 drivers perform multiple "shifts" each day, a process by which they couple a trailer to
16 their shifter, pull the trailer to a drop-off point, uncouple the trailer, get back in their
17 vehicle and repeat the process. (DSOF ¶ 4.) Based upon UPS production standards,
18 shifter drivers perform approximately one shift every five minutes, or 20 shifts per hour.
19 (DSOF ¶ 4.)

20 When the demand for shifter vehicles exceeds the number of shifters available,
21 over the road tractors called "browns" can also be used to pull trailers around UPS's
22 distribution center. (DSOF ¶ 5.) Browns, however, are not designed to perform shifts,
23 and therefore they are less effective at shifting trailers and require the driver to spend
24 approximately two to four minutes more time on each shift than the driver would if he
25 were using a shifter. (DSOF ¶ 5.) Whereas shifters have an air or hydraulic-operated fifth
26 wheel that automatically raises and lowers trailers at the touch of a button, browns require
27 the driver to manually perform that task, which adds an extra two to four minutes to each
28 shift. (DSOF ¶ 6.) Importantly, during the time period in question, most browns had air

1 conditioning, while the more utilitarian shifters did not. (DSOF ¶ 6.)

2 In the summer of 2000, Gribben suffered heart failure and was diagnosed with
3 dilated cardiomyopathy and paroxysmal arterial fibrillation. (DSOF ¶ 7.) Since then,
4 Gribben has complained that his condition prevents him from working in an environment
5 of extreme heat.¹ (DSOF ¶ 8.) According to Gribben's physician, Karl Moon, M.D.,
6 Gribben cannot work in temperatures greater than 90 degrees Fahrenheit for more than 20
7 minutes at a time. (DSOF ¶ 9.) Additionally, Dr. Moon's restrictions demand that
8 Gribben be exposed to air conditioning for 5 to 10 minutes for every 20 minutes he spends
9 in the heat. Otherwise, the air conditioning will not have its desired effect. (DSOF ¶ 9.)
10 As explained below, there is no "reasonable accommodation" that would allow UPS to
11 comply with these restrictions. *See* Section II.B., *infra*.

12 As a shifter driver, Gribben is required to work outdoors in temperatures that
13 sometimes exceed 110° Fahrenheit for periods longer than 20 minutes. (DSOF ¶ 10.) The
14 essential functions of a shifter driver require that employees work outdoors in an
15 environment with variable temperatures and humidity, and tolerate exposure to outside
16 inclement weather, including extreme heat. (DSOF ¶ 11.) Shifter drivers often perform
17 their job functions during the hottest times of the day. According to an independent
18 industrial analyst, Dr. Peter Vasquez, even in those trucks that have air conditioning, the
19 temperature inside does not drop below 90 degrees (Gribben's maximum heat exposure
20 level) until after 11:00 p.m. during the summer months. (DSOF ¶ 13.) This is likely
21 attributable to the constant opening of the door to get in and out of the vehicle and other
22 factors preventing cold air from being sealed in the cab. Furthermore, shifter drivers

23
24 ¹ Whether Gribben's heart condition is aggravated by heat is a disputed fact, which
25 is immaterial for purposes of this Motion. On July 31, 2002, Dr. Peter Vasquez examined
26 Gribben and determined that there was "no objective evidence that [Gribben's] heart
27 condition decompensates under the physiologic demands of the heat." (DSOF ¶ 21.)
28 Then on April 21, 2003, Dr. N. S. Prakash determined that Gribben's condition was not
exacerbated by high ambient temperatures and his condition would not restrict Gribben
from engaging in the physical activity that is required of a shifter driver. (DSOF ¶ 22.)
However, the Court need not decide this issue to resolve this case.

1 spend more than one-half of their workday outside of their vehicles. (DSOF ¶ 14.) Due
2 to the frequent coupling and uncoupling of trailers that shifter drivers must do, they may
3 spend fewer than five minutes inside their trucks during each “shift.” (DSOF ¶ 14.)
4 Thus, an air conditioned truck, though more comfortable, is a futile accommodation
5 because it does not allow Gribben to work within the restrictions set forth by his
6 physician.

7 Even assuming Gribben could perform the essential functions of his job with the
8 accommodation he requests, UPS cannot guarantee Gribben an air-conditioned truck
9 every day. (DSOF ¶ 15.) UPS assigns vehicles to its shifter drivers based upon
10 availability. (DSOF ¶ 15.) One attribute of UPS's continued success as a global shipping
11 enterprise is its ability to efficiently manage its transportation fleet. (DSOF ¶ 16.) At his
12 request, Gribben was often assigned to an air-conditioned brown vehicle but, due to
13 business demands, an air-conditioned brown is not always available. (DSOF ¶ 15.) One
14 of UPS's fundamental business policies is that it reserves the right to assign any truck to
15 any employee based upon business needs and equipment demands. (DSOF ¶ 16.) UPS
16 cannot and does not guarantee any employee the same vehicle every day. (DSOF ¶ 15.)
17 It would be impossible to make such a guarantee. (DSOF ¶ 16.)

18 There are several factors that impact the availability of equipment, and which
19 would therefore preclude UPS from guaranteeing the same vehicle to the same person day
20 in and day out. (DSOF ¶ 17.) First, vehicles break down and they need maintenance and
21 repairs. (DSOF ¶ 17.) Second, the fluctuating demands of its business may require
22 certain vehicles to be used for other purposes. (DSOF ¶ 18.) An air-conditioned brown
23 that could be used as a shifter may be out on the road transporting trailers, or it may be in
24 use for employee training purposes, as it was on the day in 2004 when Gribben refused to
25 work because there was no air-conditioned truck available to him. (DSOF ¶ 18.) Third,
26 shifters and browns are frequently repositioned between UPS hubs regionally based upon
27 business demands. (DSOF ¶ 19.) A brown being used at UPS's Phoenix facility one week
28 might be sent to California the next week due to an equipment shortage, increased

1 volume, mechanical function, EPA emissions standards, or a number of other business
2 reasons. (DSOF ¶ 19.) That brown might be replaced with a shifter not equipped with air
3 conditioning, or it might not be replaced at all. (DSOF ¶ 19.)

4 Even if UPS could guarantee Gribben an air-conditioned truck, Gribben's request
5 for frequent air-conditioned breaks as an accommodation is unreasonable because it
6 would require UPS to eliminate one or more essential functions of his job. If Gribben
7 were given a 5 to 10 minute break every 20 minutes, UPS would need to hire a helper, or
8 reassign another employee to cover the shifts each hour that Gribben could not perform
9 while he was out on break. (DSOF ¶ 20.) An employer is not required to hire a helper, or
10 to transfer an employee's duties to his co-workers as a reasonable accommodation. In that
11 regard, Gribben's requested accommodation is patently unreasonable.

12 **II. GRIBBEN'S DISABILITY DISCRIMINATION CLAIM FAILS**

13 To state a prima facie claim of disability discrimination under the ADA, Gribben
14 must demonstrate, among other things, that he is a qualified individual with a disability,
15 meaning that he can perform the essential functions of his job with or without reasonable
16 accommodation. *See* 42 U.S.C. § 12111(8); *Toyota Motor Manufacturing, Kentucky, Inc.*
17 *v. Williams*, 534 U.S. 184, 193 (2002).

18 **A. Gribben is not a "qualified" individual with a disability.**

19 The key issue in this Motion is whether Gribben can perform the essential
20 functions of his job with or without his requested accommodation. He must be able to
21 perform the essential functions to demonstrate that he is qualified individual with a
22 disability entitled to the anti-discrimination protections of the ADA. *See* 42 U.S.C. §§
23 12111(8) and 12112(a); *Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104,
24 1108 (9th Cir. 2000). The uncontroverted facts prove that Gribben cannot perform the
25 essential functions of his job with or without a reasonable accommodation, and
26 accordingly, his claim fails.

27 As noted, Gribben's physician imposed specific heat and time restrictions on his
28 ability to work. Gribben argues that UPS should accommodate these restrictions by

1 guaranteeing him an air conditioned truck and allowing him break periods to cool off. But
2 even if Gribben were provided these accommodations, the undisputed evidence
3 demonstrates that the summer temperatures in his truck would not drop down to the level
4 required by his doctor. Thus, Gribben's requested accommodation is futile because it
5 would leave Gribben unable to perform the essential functions of his job while following
6 his doctor's orders.

7 It is well established law that, where the accommodation requested by an employee
8 would be futile, the employer is not required to provide the accommodation. *See Hanson*
9 *v. Lucky Stores, Inc.*, 74 Cal.App.4th 215, 226, 87 Cal.Rptr.2d 487, 494 (Cal.App. 2 Dist.
10 1999) (employer not required to provide accommodation that would be futile); *Charles v.*
11 *Nike, Inc.*, 255 Fed.Appx. 127, 129 (9th Cir. 2007) (same holding under the FEHA); *Perez*
12 *v. Linear Tech. Corp.*, 4 Fed.Appx. 527 (9th Cir. 2001) (unpublished).²

13 Similarly, if an employee's physician imposes restrictions that prohibit the
14 employee from performing the essential functions of his job, that employee is not a
15 qualified individual with a disability. *See* 42 U.S.C. § 12111(8). In *Timmons v. United*
16 *Parcel Service, Inc.*, No. 2:05-CV-02175-MCE-EFB, 2007 WL 2288320 (E.D. Cal.
17 August 8, 2007) (unreported), the plaintiff was a UPS package car driver who delivered
18 packages to businesses and residences. The essential functions of the job required
19 Timmons to be able to lift packages up to 70 pounds above shoulder level. *Id.* at *4.
20 Timmons suffered injuries to his knee and shoulder, and his doctor restricted him from
21 lifting more than 10 pounds and from performing overhead work. *Id.* at *2. The court
22 ruled that because Timmons was unable to perform an essential function of his job, he was
23 not a qualified individual with a disability under the ADA, and his disability

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25 ² As a note on unpublished decisions, any unpublished decision issued on or after January
26 1, 2007 may be cited to courts of the Ninth Circuit pursuant to F.R.A.P. 36-3. As a
27 supplement to published decisions from other circuits, UPS has cited certain unpublished
28 Ninth Circuit decisions that predate January 1, 2007 to demonstrate that the Ninth Circuit
is in agreement on the specific point of law noted, and in these instances no contrary
Ninth Circuit authority was found.

1 discrimination claim was dismissed. *Id.* at *5.

2 A similar decision should be rendered here. Gribben cannot perform the essential
3 functions of his job even with his requested accommodation. Based upon Dr. Vasquez's
4 uncontroverted findings, even if Gribben were permanently assigned to an air-conditioned
5 truck, the temperatures inside the cab would remain in excess of the 90-degree restriction
6 imposed by his physician. Gribben is not a qualified individual with a disability, and
7 therefore his disability discrimination claim must be dismissed. *See Bates v. United*
8 *Parcel Service, Inc.*, 511 F.3d 974, 989 (9th Cir. 2007) ("If a disabled person cannot
9 perform a job's 'essential functions' (even with a reasonable accommodation), then the
10 ADA's employment protections do not apply") (citation omitted); *Weyer*, 198 F.3d at 1108
11 (same); *See also Patton v. Dobson Ass'n*, 113 F.3d 1242, 1997 WL 218587, *1
12 (unpublished) (affirming dismissal of disability discrimination claim because "there is no
13 evidence that [plaintiff] could fulfill his job responsibilities even if he were allowed
14 frequent rest stops and periodic leaves of absence.")

15 **B. Gribben's suggested accommodations are unreasonable.**

16 Gribben has the burden of proving that a reasonable accommodation exists, which
17 would allow him to perform the essential functions of his job. *Dark v. Curry County*
18 451 F.3d 1078, 1088 (9th Cir. 2006). Even if an air-conditioned truck could reduce
19 Gribben's heat exposure to the level required by his physician, Gribben's requested
20 accommodations are unreasonable. Gribben's physician ordered two work restrictions: (1)
21 permanent assignment to an air-conditioned truck; and (2) 5-10 minute breaks for every
22 20 minutes spent in the heat. Because these accommodations would require UPS to
23 eliminate one or more essential functions of Gribben's position and substantially modify
24 its operations, neither accommodation is reasonable as a matter of law.

25 **1. UPS cannot guarantee Gribben permanent use of an air-**
26 **conditioned truck.**

27 UPS cannot guarantee Gribben an air-conditioned truck. For the reasons described
28 above, UPS assigns vehicles to its shifter drivers based upon business needs and

1 equipment availability. *See* Section I, *supra*. In order to guarantee Gribben an air-
2 conditioned truck, UPS would have to change this fundamental business practice.

3 UPS reserves the right to assign any truck to any employee based upon the needs
4 and equipment demands of the business on any given day. UPS cannot and does not to
5 guarantee any employee the same vehicle every day. It would be impossible to make such
6 a guarantee. As explained in detail above, there are several factors that impact the
7 availability of equipment, and which would therefore preclude UPS from guaranteeing the
8 same vehicle to the same person day in and day out, such as vehicle maintenance and
9 repairs, fluctuating business demands, and the repositioning of equipment regionally
10 between UPS hubs. For example, when Gribben refused to work in 2004 because there
11 was no air-conditioned truck available for him to use, UPS had assigned several trucks to
12 be used for employee training.

13 It is well-established that an employer is not required to fundamentally alter the
14 nature of its operations in order to accommodate an employee's disability. *See Patton*,
15 1997 WL 218587, at *1 ("an employer is not required to hire additional employees or
16 make fundamental modifications in its operations") (emphasis added); *Milton v. Scrivner*,
17 *Inc.*, 53 F.3d 1118, 1125 (10th Cir. 1995); *see also Estate of Mauro v. Borgess Medical*
18 *Center*, 137 F.3d 398, 401 (6th Cir. 1998) (affirming that job restructuring is not required
19 as accommodation).

20 In *Patton*, the Ninth Circuit held that the employer did not have to fundamentally
21 change its operations by creating a supervisory position for one of its maintenance
22 employees whose health prevented him from working outside or from performing
23 physically strenuous job duties. *Patton*, 1997 WL 218587, at *1. Similarly, in *Milton*, the
24 Tenth Circuit held that the employer did not have to slow its production schedule as a
25 reasonable accommodation for the plaintiffs because that would "fundamentally alter the
26 nature of the defendant's warehouse operation, a change not demanded by the law."
27 *Milton*, 53 F.3d at 1125. Here, in order to guarantee that an air-conditioned truck was
28 available for Gribben every day, UPS would be required to fundamentally restructure the

1 way it manages and assigns its equipment. Gribben's proposed accommodation exceeds
 2 the scope of UPS's obligations under the ADA, and it is therefore unreasonable.

3 **2. Gribben's proposed accommodation would require UPS to**
 4 **eliminate one or more of the essential functions of his job.**

5 In addition to a guarantee of an air-conditioned truck, Gribben needs 5-10 minute
 6 breaks for every 20 minutes he spends in the heat. Similar to his request for the air-
 7 conditioned truck, Gribben's request for frequent cooling breaks is unreasonable because
 8 it would require UPS to eliminate one or more essential functions of his job. *Dark v.*
 9 *Curry County*, 451 F.3d 1078, 1089 (9th Cir. 2006) (unreported) ("The ADA does not
 10 require an employer to exempt an employee from performing essential functions or to
 11 reallocate essential functions to other employees"); *McGregor v. National Railroad*
 12 *Passenger Corp.*, 185 F.3d 868, 1999 WL 401662, *1 (9th Cir. 1999) (unpublished)
 13 (employer is not required to eliminate or reassign essential job functions as a reasonable
 14 accommodation); *American Federation of Government Employees Council 33, Local 51 v.*
 15 *Bentsen*, 35 F.3d 570, 1994 WL 481919, *2 (9th Cir. 1994) (employer not required to
 16 accommodate employee by eliminating essential job function); *see also* 42 U.S.C. §
 17 12111 (8) (defining "qualified individual" as someone who can perform the essential
 18 functions of the job); 45 C.F.R. § 84.12 (defining the term "reasonable accommodation").

19 Gribben's physician, Karl Moon, M.D., stated that for the air-conditioning in a
 20 truck to have its desired effect upon Gribben, he would have to be exposed to air
 21 conditioning for 5 to 10 minutes for every 20 minutes he spends in the heat. (DSOF ¶ 9.)
 22 UPS's production standards for shifter drivers require drivers to constantly get out of their
 23 vehicles to couple and uncouple trailers and to perform 20 shifts per hour. (DSOF ¶ 4.)
 24 Under his proposed accommodation, Gribben would be on break for 10 to 20 minutes
 25 each hour, and would therefore be unavailable to perform 4 to 8 shifts each hour. To keep
 26 pace with the influx of trailers needing to be shifted, UPS would need to hire a helper, or
 27 reassign another employee to cover the 4 to 8 shifts each hour that Gribben could not
 28 perform while he was out on break.

1 The law is clear that an employer is not required to hire a helper or transfer an
2 employee's duties to his co-workers as a reasonable accommodation. *Cochrum v. Old Ben*
3 *Coal Co.*, 102 F.3d 908, 912 (7th Cir. 1996) (“[H]iring a helper to perform the overhead
4 work would mean the helper would de facto perform Cochrum's job. We cannot agree
5 that Cochrum would be performing the essential functions of his job with a helper.”); *see*
6 *also Cota v. Cyprus Amax Minerals Co.*, 72 Fed.Appx. 538, 539 (9th Cir. 2003)
7 (accommodation where employee's co-workers perform the essential job functions that he
8 cannot is unreasonable and not required); *Dark*, 451 F.3d at 1089; *Hansen v. Henderson*,
9 233 F.3d 521, 523-24 (7th Cir. 2000) (stating that an employer need not create a new job
10 or provide a helper as an accommodation to a disabled employee); *Sieberns v. Wal-Mart*
11 *Stores, Inc.*, 125 F.3d 1019, 1022 (7th Cir. 1997) (“to accommodate him [the employer]
12 would have to hire someone else to help perform some duties. That clearly was beyond a
13 reasonable accommodation.”); *Gilbert v. Frank*, 949 F.2d 637, 644 (2d Cir. 1991)
14 (assigning other postal employees to do the plaintiff's heavy work not a reasonable
15 accommodation). It follows that Gribben would not be performing the essential functions
16 of his job if a co-worker was required to cover 4-8 of his shifts every hour, every day.
17 Accordingly, Gribben's proposed accommodation of 5-10 minute breaks for every 20
18 minutes spent in the heat is unreasonable.

19 The same is true if UPS were to permanently assign Gribben an air-conditioned
20 brown vehicle. Because browns are not designed to shift trailers, they are much less
21 efficient at coupling and uncoupling, and drivers are required to spend approximately 2-4
22 more minutes per shift than if they were using a shifter. Permanently assigning Gribben a
23 brown truck would further reduce the number of shifts per hour that Gribben could
24 perform, and would require further assistance from another worker to cover the shifts that
25 Gribben was not performing (in addition to those he was not performing due to his
26 frequent breaks). Again, Gribben would not be performing the essential functions of his
27 job if his co-workers were performing his duties for him. Accordingly, Gribben's
28 proposed accommodations of permanent assignment to an air-conditioned brown vehicle

1 and 5-10 minute breaks every 20 minutes are unreasonable, and his disability
2 discrimination claim fails.

3 **III. CONCLUSION**

4 Gribben has failed to raise a genuine issue of material fact with respect to his
5 disability discrimination claim because he cannot show that he is a qualified individual
6 with a disability. Furthermore, even if Gribben could perform the essential functions of
7 his job with an air-conditioned truck (despite the independent medical evidence to the
8 contrary), Gribben's proposed accommodation is unreasonable because it would require
9 UPS to eliminate one or more essential functions of the job and/or fundamentally alter its
10 operations. Accordingly, Gribben's disability discrimination claim necessarily fails. UPS
11 respectfully requests that this Court summarily dismiss Gribben's disability discrimination
12 claim for the reasons set forth above.

13 RESPECTFULLY SUBMITTED this 14th day of November, 2008.

14 QUARLES & BRADY LLP
15 Renaissance One
16 Two North Central Avenue
Phoenix, AZ 85004-2391

17 By s/ Benjamin J. Naylor
18 David T. Barton
19 Carrie M. Francis
20 Benjamin J. Naylor
21 Attorneys for Defendant
22
23
24
25
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1 I hereby certify that on the 14th day of
2 November, 2008, I electronically
3 transmitted the attached document to the
4 Clerk's Office using the CM/ECF System
5 for filing and transmittal of a Notice of
6 Electronic Filing to the following
7 CM/ECF registrants:

8 Susan Martin
9 Daniel L. Bonnett
10 Jennifer Kroll
11 MARTIN & BONNETT
12 3300 N. Central, Suite 1720
13 Phoenix, AZ 85012-2517
14 Attorneys for Plaintiff

15 s/Ginger L. Chilcote